

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7752

Petition of Vermont Transco LLC and Vermont Electric)
Power Company, Inc. (together referred to as)
"VELCO"), for authority to condemn easement rights in)
property interests of Olga Julinska, Sergei Kniazev,)
Carver Federal Savings Bank and BNE Energy, Inc.,)
located in Wells, Vermont, for the purpose of)
reconstructing and maintaining an existing)
telecommunications facility for the so-called Statewide)
Radio Project (SRP))

Order entered: 11/18/2011

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

On November 14, 2011, Ms. Olga Julinska and Mr. Sergei Kniazev (the "Landowners") filed a motion pursuant to V.R.C.P. 26(c) for a protective order (the "Landowners' Motion") with respect to the location of the deposition of Mr. Kniazev by Vermont Electric Power Company, Inc. and Vermont Transco LLC (jointly, "VELCO") in this proceeding. On November 15, 2011, I issued a summary ruling granting the Landowners' Motion.¹ In this Order today, I set forth my reasons for that summary decision.

The Landowners' Motion was precipitated by a notice VELCO served on November 7, 2011, for the deposition of Mr. Kniazev on November 16, 2011, at the offices of Landowners' counsel in Manchester, Vermont.² The Landowners seek to ensure that the depositions in this case of Mr. Kniazev and Ms. Julinska will be taken between December 2 and 9, 2011, at a location within 25 miles of their residence in Boston, Massachusetts. The Landowners' request for this relief is based on the following grounds which are supported by a duly-sworn affidavit from Ms. Julinska: (1) leaving Boston at this time to attend depositions in Vermont would be highly disruptive for the Landowners' business, as they are the sole proprietors of a small enterprise for which November marks the busiest period for sales and shipping in advance of Thanksgiving, the traditional start of the holiday shopping season; (2) attending depositions in Vermont would be very inconvenient for the Landowners, who must travel with their three young

1. The summary ruling was issued for the purpose of promoting the efficient use of the parties' litigation resources.

2. The Landowners anticipate that VELCO will soon notice a deposition for Ms. Julinska. Landowners' Motion at 2.

children and who cannot be sure that seasonal weather conditions will permit them to gain access to their mountaintop residence in Wells, Vermont.³

In opposing the Landowners' Motion, VELCO contends that "[t]he depositions of Vermont landowners in a matter related to their Vermont property ought to be held in Vermont absent some extraordinary circumstances not present in this case."⁴ According to the Company, the Landowners' "claims of hardship from having to travel to Vermont are just not credible," and "requiring depositions in or near Boston will not be an insignificant expense for VELCO."⁵

Under Vermont law, for good cause shown and if justice so requires, a court may grant a motion for an order that designates the time or place of a deposition for the purpose of protecting a party from bearing an "undue burden" occasioned by the litigation process.⁶ In deciding such motions, courts generally insist "on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause."⁷

The deposition process in discovery is governed by V.R.C.P. 30, which is applicable in proceedings before the Vermont Public Service Board pursuant to P.S.B. Rule 2.103. While V.R.C.P. 30 is long on text and ranks among the more intricate rules in Vermont's Code of Civil Procedure, the rule offers few specifics with respect to fixing the location of a deposition, beyond requiring that a deposition notice "shall state the time and place for taking the deposition"⁸ As Rule 30 specifies no further guidance, counsel for the parties are expected to settle among themselves the logistical details for convening depositions.⁹ However, if such cooperation among counsel proves elusive, as has happened in this case, then it falls to the court to use its discretion to determine when and where a deposition shall take place.

In urging the approval of their request to be deposed near their residence in Massachusetts in December, the Landowners note the "broad acceptance of the principle that defendants who live out of state are deposed near their homes or principal places of business" rather than being

3. Affidavit of Olga Julinska dated November 10, 2011.

4. VELCO Response to Landowners' Second Motion for Protective Order at 1-2 ("VELCO Reply").

5. VELCO Reply at 9-10.

6. V.R.C.P. 26(c).

7. 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2035 (2d.2009).

8. V.R.C.P. 30(b)(1).

9. See V.R.C.P. 26(h) ("Counsel have the obligation to make good faith efforts among themselves to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions.")

required to travel long distances for this purpose.¹⁰ In turn, VELCO correctly points out that this principle applies in the context of deposing non-party witnesses and corporate officers who have been designated as corporate witness representatives pursuant to V.R.C.P. 30(b)(6), and that the Landowners' circumstances do not fit either of these descriptions.¹¹ In the alternative, the Company argues that "[e]ven if the presumption to depose defendants where they live had application in condemnation cases," the Landowners would not prevail under a recognized exception to the presumption in favor of a deponent's location.¹²

While I appreciate the efforts made on both sides to craft a framework of legal analogy for resolving this discovery dispute, I decline to adopt either analytical approach because they risk obscuring the highly case-specific and equitable nature of the discretionary judgment I have been called upon to make in prescribing a location and time frame for the depositions of Mr. Kniazev and Ms. Julinska, assuming it is noticed.

Based on the particular and specific facts contained in the Julinska Affidavit, I find the Landowners have demonstrated good cause for me to conclude that it would indeed be a significant burden to require them at this point to interrupt their business activities to attend depositions in Vermont. Furthermore, for the reasons discussed below, I am persuaded that this significant burden amounts to an undue burden under the circumstances of this particular case.

At the outset of this condemnation proceeding, VELCO requested — without opposition from the Landowners — a litigation schedule that would facilitate the issuance of a final decision in early 2012.¹³ It is significant to me that, to date, the Company has chosen not to request an amendment to the existing procedural schedule — an option that would have allowed for deposing Mr. Kniazev and Ms. Julinska in Vermont at a time that was less burdensome to them. Similarly, I note that VELCO intends to videotape the deposition of Mr. Kniazev, thus electing to forgo its option of deposing him by telephone as permitted under V.R.C.P. 30(b)(7).¹⁴ Both of these facts reflect legitimate choices that VELCO has made in managing its litigation interests in this case. However, just as the Company enjoys the prerogative of making such procedural choices, it is also fitting for the Company to bear the burdensome consequences, if

10. Landowners' Motion at 3-4 (citing cases related to federal civil practice outside of Vermont).

11. VELCO Reply at 6.

12. VELCO Reply at 7 (citing *In re Outside Wall Tire Litigation*, 267 F.R.D.466, 470 (E.D.Va. 2010)).

13. Docket 7752, Order of 9/23/11 at 1.

14. VELCO Reply at exh. A.

any, of those same choices. In this sense, I find it would be an "undue burden" to require the Landowners to report for depositions in Vermont at a time that is highly inconvenient for them, and that would not be necessary but for choices made by VELCO in the conduct of its case. As owners of the property rights that are proposed for condemnation in this docket, the Landowners presumably have neither a need to complete this case under the existing procedural schedule, nor any particular preference as to whether they are deposed in person or by telephone. Thus, under these circumstances, I conclude it is appropriate to protect the Landowners from shouldering the undue burden of traveling to Vermont for depositions scheduled on dates that are disruptive to their business activities — it lies within VELCO's power to mitigate the unduly burdensome nature of the deposition terms it has proposed. Accordingly, for the reasons discussed herein, the Landowners' Motion is granted.

So ORDERED.

Dated at Montpelier, Vermont, this 18th day of November, 2011.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 18, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)